

CABINET FOR HEALTH AND FAMILY SERVICES
Department for Behavioral Health, Developmental and Intellectual Disabilities
Division of Behavioral Health
(New Administrative Regulation)

908 KAR 1:390. Voluntary Employer Substance Use Program (VESUP).

RELATES TO: KRS 222.215

STATUTORY AUTHORITY: KRS 222.215

NECESSITY, FUNCTION, AND CONFORMITY: KRS 222.215 requires the cabinet to promulgate administrative regulations to implement employer-facilitated access to substance use disorder treatment for employees who screen positive during an employment-related drug screening. This administrative regulation establishes a voluntary program in which employers may facilitate employee access to substance use disorder treatment, rather than terminate or refuse hire, and sets criteria for that program.

Section 1. Definitions. (1) "Cabinet" means the Cabinet for Health and Family Services.
(2) "Employer" is defined by KRS 222.215(1)(b).

Section 2. Voluntary Employer Substance Use Program (VESUP) policy. (1) An employer that elects to participate in VESUP shall have the following elements written in their workplace drug and alcohol policy:

(a) Policy rationale and goals that include:

1. Reason for policy;
 2. Intended outcomes of the policy; and
 3. How and with whom the policy was developed;
- (b) Expectations and compliance elements that include:

1. When and where the policy applies;
2. Employee positions the policy applies to;
3. Expected employee behavior; and
4. Prohibited behaviors and substances;

(c) Drug screening procedures and guidelines, including:

1. A list of screened substances;
2. Screening facilities approved by the cabinet;
3. Number of times an employee shall be screened, including minimums and maximums;

and

4. Screening confidentiality and privacy protocols;

(d) Resources for evidence-based substance use disorder prevention; and

(e) A process for identifying licensed substance use disorder treatment providers.

(2) An employer's VESUP policy shall be accessible upon request to all employees and the cabinet.

(3) Employee compliance with the employer's VESUP policy shall be a condition of employment.

Section 3. Employee participation in substance use disorder treatment.

(1) Employers participating in the VESUP shall require employee participation in licensed substance use disorder treatment services as a condition of employment to work within their area of expertise or professional licensure as applicable if:

(a) An employee screens positive during an employment-related drug screening; and

(b) A biopsychosocial clinical assessment performed by a licensed substance use disorder treatment provider determines the need for substance use treatment.

(2) If a licensed substance use disorder treatment provider determines via biopsychosocial clinical assessment that substance use disorder treatment is not necessary, the employee shall comply with the recommendations deemed appropriate by the clinical assessment as a condition of employment.

(3) An employee identified in subsection (1) of this section shall follow the treatment plan as written by the licensed substance use disorder treatment provider.

Section 4. Employer participation in substance use disorder treatment.

(1) An employer shall agree to allow the employee to follow the treatment plan written by a licensed substance use disorder treatment provider as described in Section 3(3) of this administrative regulation.

(2) An employer shall not penalize an employee for compliance with the treatment plan described in Section 3(3) of this administrative regulation.

Section 5. Records. (1) An employer shall secure all records and information concerning an employee's substance use screening and treatment.

(2) Records as specified in subsection (1) of this section shall include:

(a) Results of employee drug screens; and

(b) Documentation of employee participation and compliance in substance use disorder treatment services.

(3) Records specified in this section shall be maintained separately from the employee's personnel file.

(4) Records specified in this section shall be disclosed in accordance with KRS 222.215(6)(e).

Section 6. Program requirements. (1) An employee that violates the employer workplace drug and alcohol policy by screening positive during an employment-related drug screening, rather than being terminated or refusing hire, shall have the option to receive services from a licensed substance use disorder treatment provider for:

(a) An initial comprehensive biopsychosocial clinical assessment using a multidimensional assessment tool, that complies with the most current edition of the American Society of Addiction Medicine (ASAM) criteria to determine the appropriate level of care in accordance with 908 KAR 1:370, Section 18; and

(b) If deemed appropriate, creation of a written treatment plan pursuant to 908 KAR 1:370, Section 19.

(2) Employees specified in subsection (1) of this section who elect to participate in this program, shall provide their employer with signed consent authorizing the employer to receive documentation confirming employee participation and compliance with recommendations of the clinical assessment.

(3) Employees specified in subsection (1) of this section shall be informed of all FDA-approved options to treat substance use disorder from the employer or the cabinet if referred by the employer.

Section 7. Referral information. Employers may find the following information at <http://dbhdid.ky.gov/>:

(1) A list of some of the licensed substance use disorder treatment providers available;

(2) Employer education on addressing substance use in the workplace; and

(3) Screening facilities approved by the cabinet.

WENDY T. MORRIS, Commissioner

ERIC C. FRIEDLANDER, Secretary

APPROVED BY AGENCY: March 3, 2021

FILED WITH LRC: March 4, 2021 at 1:08 p.m.

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall, if requested, be held on May 24, 2021 at 9:00 a.m. in Suites A & B, Health Services Building, First Floor, 275 East Main Street, Frankfort, Kentucky 40621. Individuals interested in attending this hearing shall notify this agency in writing by May 17, 2021, five (5) workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who attends will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on this proposed administrative regulation until May 31, 2021. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to the contact person. Pursuant to KRS 13A.280(8), copies of the statement of consideration and, if applicable, the amended after comments version of the administrative regulation shall be made available upon request.

CONTACT PERSON: Krista Quarles, Policy Analyst, Office of Legislative and Regulatory Affairs, 275 East Main Street 5 W-A, Frankfort, Kentucky 40621; phone 502-564-6746; fax 502-564-7091, email CHFSregs@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Persons: Justin Dearing and Krista Quarles

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation establishes a voluntary program in which employers may facilitate employee access to substance use disorder treatment, rather than terminate or refuse hire, and sets criteria for that program.

(b) The necessity of this administrative regulation: This administrative regulation is necessary to establish a voluntary program in which employers may facilitate employee access to substance use disorder treatment to comply with KRS 222.215.

(c) How this administrative regulation conforms to the content of the authorizing statutes: This administrative regulation conforms to the content of the authorizing statutes by establishing a voluntary program in which employers may facilitate employee access to substance use disorder treatment to comply with KRS 222.215.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation assists in the administration of the statutes by establishing a voluntary program in which employers may facilitate employee access to substance use disorder treatment, rather than terminate or refuse hire, and sets criteria for that program.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: This is a new administrative regulation.

(b) The necessity of the amendment to this administrative regulation: This is a new administrative regulation.

(c) How the amendment conforms to the content of the authorizing statutes: This is a new administrative regulation.

(d) How the amendment will assist in the effective administration of the statutes: This is a new administrative regulation.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation will affect any employer who volunteers for the program and all of their employees. This administrative regulation will also affect the Department for Behavioral Health, Developmental and Intellectual Disabilities.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: Employers who volunteer for this program will have to allow access to substance use disorder treatment for employees who test positive for a drug screen. Employers will also have to abide by certain privacy restrictions, have written plans of operation, and drug screening procedures.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): This administrative regulation will create no new or additional costs to regulated entities. The Department for Behavioral Health, Developmental and Intellectual Disabilities would incur additional costs to implement 2020 SB 191 to cover staffing, training, promotional material, and resource material development and dissemination. While it is difficult to assess how many employers might take advantage of the provisions of the bill, based on implementation of similar legislation in other states, we estimate the provision of at least one part-time (.5 FTE) BHDID/Program Administrator to help develop regulations, review employers' programs; provide technical assistance; and provide ongoing assessment of the programs' continued fidelity. Using a salary between minimum and midpoint for the required staff (in order to acquire experienced staff) with a fringe rate of 120%, estimated costs of the part-time (.5 FTE) BHDID Program Administrator would be \$66,000. An additional \$6,000 of operating would be required to meet the equipment, space, and travel needs of the Program Administrator. Lastly, due to staffing and time constraints, the development and dissemination of resource and training materials would be procured through contract at the estimated cost of \$260,000. This contract can be supported by time-limited federal funding through 9/30/2021. In total, the estimated annual impact would be \$332,000.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): This administrative regulation allows for the potential treatment of employees with a substance use disorder, increasing employee retention and decreasing employee turnover. In addition, employers in this program reduce their liability for civil actions in accordance with KRS 222.215(8).

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: It will cost this administrative body \$332,000 initially to implement this administrative regulation.

(b) On a continuing basis: There will be a continual cost of \$332,000 annually to administer this administrative regulation from this administrative body.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: State general funds will be used for the implementation and enforcement of this administrative regulation after 9/30/2021. Time-limited-federal funding will be used to pay for the contracts before 9/30/2021.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: The administrative regulation does not require an increase in fees or funding.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: The administrative regulation does not establish any fees or directly or indirectly increase any fees.

(9) TIERING: Is tiering applied? The administrative regulation does not apply tiering. The standards are applicable in a like manner statewide.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

1. What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Cabinet for Health and Family Services will be impacted by this administrative regulation.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 222.215

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? This administrative regulation will not generate new revenue.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? This administrative regulation will not generate new revenue.

(c) How much will it cost to administer this program for the first year? It will cost this administrative body \$332,000 initially to administer this administrative regulation.

(d) How much will it cost to administer this program for subsequent years? There will be a continual cost of \$332,000 annually to implement this administrative regulation from this administrative body.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation: